

**Before the
FEDERAL ELECTION COMMISSION
Washington, D.C. 20463**

In the Matter of:)
)
Notice of Proposed Rulemaking:) Notice 2005 - 10
Internet Communications)

To: The Commission

**COMMENTS OF THE NORTH CAROLINA
ASSOCIATION OF BROADCASTERS**

The North Carolina Association of Broadcasters ("NCAB"), by its attorneys, respectfully submits these comments in response to the Commission's *Notice of Proposed Rulemaking* regarding Internet Communications ("*Notice*").¹ The *Notice* proposes, among other things, to amend sections 100.73 and 100.132 of the Commission's rules to reflect that any media activities exempted from the definition of "contribution" or "expenditure" are also exempt when they are transmitted over the Internet. For the reasons discussed below, the proposed extension of the "media exemption" to Internet communications is required by the First Amendment, consistent with the statutory language of the Federal Election Campaign Act ("FECA"), and reflects the technological advances that allow broadcasters to provide election coverage to the ever-growing number of Americans who turn to the Internet for news and information.

¹ Federal Election Commission, *Notice of Proposed Rulemaking*, 2005-10, Internet Communications, 70 Fed. Reg. 16967 (Apr. 4, 2005).

I. BACKGROUND

FECA prohibits corporations from making contributions or expenditures in connection with a Federal election. 2 U.S.C. § 441b(a). FECA exempts from the definition of “expenditure” any “news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication, unless such facilities are owned or controlled by any political party, political committee, or candidate.” 2 U.S.C. § 431(9)(B)(i).

From this statutory command, the Commission’s rules provide that:

Any cost incurred in covering or carrying a news story, commentary, or editorial by any broadcasting station (including a cable television operator, programmer or producer), newspaper, magazine, or other periodical publication is not a [contribution or expenditure] unless the facility is owned or controlled by any political party, political committee, or candidate, in which case the costs for a news story:

- (a) That represents a *bona fide* news account communicated in a publication of general circulation or on a licensed broadcasting facility; and
- (b) That is part of a general pattern of campaign-related news accounts that give reasonably equal coverage to all opposing candidates in the circulation or listening area, is not a [contribution or expenditure].

11 C.F.R. §§ 100.73, 100.32.

The media exemption is designed to ensure that the Commission does not “limit or burden in any way the first amendment freedoms of the press.” *See Candidate Debates and News Stories*, 61 Fed. Reg. 18049, 18050 (April 24, 1986) (quoting H.R. Rep. No. 93-1239, 93d Cong., 2d Sess. at 4 (1974)); *accord Roth v. United States*, 354 U.S. 476, 484 (1957) (First Amendment affords the broadest protection “to assure [the] unfettered interchange of ideas for the bringing about of political and social changes

desired by the people.”); *see also Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 387 (1969) (broadcast medium is entitled to First Amendment protection).

The media exemption also preserves and promotes the “unique societal role” that broadcasters and publishers play in “informing and educating the public, offering criticism, and providing a forum for discussion and debate.” *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 667 (1990) (quoting *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 781 (1978)). By exempting *bona fide* coverage of election events from the definitions of “contribution” or “expenditure,” the Commission “ensures that the Act does not hinder or prevent the institutional press from reporting on, and publishing editorials about, newsworthy events.” *Austin*, 494 U.S. at 668. Because of this special role that broadcasters and publishers play in distributing information to the public, the Court has held that, with respect to campaign finance laws, “[a] valid distinction [] exists between corporations that are part of the media industry and other corporations that are not involved in the regular business of imparting news to the public.” *Id.* at 668; *see also McConnell v. FEC*, 540 U.S. 93, 209 (2003) (upholding exemption for media companies from provision in Bipartisan Campaign Reform Act that prohibits corporations or labor unions from making “electioneering communications”).

At least two federal courts have defined the practical contours of the media exemption. In *Reader’s Digest Ass’n v. FEC*, 509 F. Supp. 1210 (S.D. N.Y. 1981) and *FEC v. Phillips Publishing, Inc.*, 517 F. Supp. 1308 (D. D.C. 1981), the district courts determined that the media exemption applies if (1) the media entity is not owned or controlled by a political party or candidate and (2) its activities “fall broadly within the press entity’s legitimate press function.” *Reader’s Digest*, 509 F. Supp. at 1214; *Phillips*,

517 F. Supp. at 1313. In both cases, the courts determined that the exemption would apply even to a media entity's promotional materials or solicitation letters that publicize its news content or editorial positions. *See Phillips*, 517 F. Supp. at 1313 ("Because the purpose of the solicitation letter was to publicize the publication and obtain new subscribers, both of which are legitimate press functions, the press exemption applies.")

II. THE COMMISSION SHOULD EXTEND THE MEDIA EXEMPTION TO INCLUDE INTERNET COMMUNICATIONS

The Commission proposes to extend the application of the media exemption to all forms of media activities that occur over the Internet—*i.e.*, through a Web site, e-mail, or other form of Internet communication. The Commission's proposal is commanded by the First Amendment, consistent with the text and history of FECA, and reflects the ubiquity of the Internet as a source of political news and information.

First, the same First Amendment principles that "protect the free discussion of governmental affairs," *Mills v. Alabama*, 384 U.S. 214, 218 (1966), apply with equal force to communications over the Internet. *See Reno v. ACLU*, 521 U.S. 844, 870 (1997). Indeed, because the Internet functions much like a modern-day public square—a low-cost platform from which almost anyone can distribute news, information or commentary regarding public affairs—it should be protected by the full thrust of the First Amendment. *Cf. Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1984) ("[s]peech concerning public affairs is more than self-expression; it is the essence of self-government").

Second, the extension of the media exemption to Internet communications is wholly consistent with text and legislative history of FECA. Section 431(9)(B)(i) defines the media exemption as any "news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical

publication[.]” (Emphasis added.) The “facilities” of a broadcast station now include Internet facilities as broadcasters have begun to distribute news and information—including election-related news and information—over the Internet in a variety of audio, video, and text formats.

The extension of the media exemption to Internet communications is also supported by the legislative history of FECA. Congress intended to preserve the “unfettered right of the newspapers, television networks, and other media” to report and comment on political events. H. Rep. No. 93-1239, 93d Cong., 2d Sess. at 4 (1974). Just as the FEC recognized in 1986 that cable systems were “precisely” the type of “other media” to which the exemption should apply, the FEC is right to afford the same treatment to Internet communications. *See Candidate Debates and News Stories*, 61 Fed. Reg. 18049, 18050 (April 24, 1986) (extending media exemption to cable operators, cable producers, and cable programmers).

Finally, the Commission’s proposed rule reflects the technological fact that consumers are getting more of their news and information from the Internet. As the Commission notes, 92 million Americans turned to the Internet for news in mid-2004. *Notice* at 16970. Most pertinent to this proceeding, more than 60 million Americans received “political news” from the Internet in 2004. *Pew Internet & American Life and the University of Michigan School of Information, The Internet and the Democratic Debate* at 2-3 (October 27, 2004). The fact that the formats or facilities through which broadcasters may distribute news and information is ever-changing in no way dilutes the public’s interest in receiving such news and information. *See Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 653 (1994) (“the importance of local broadcasting

outlets can scarcely be exaggerated, for broadcasting is demonstrably a principal source of information and entertainment for a great part of the Nation's population.”) (internal quotation omitted). Indeed, the greater the number of consumers who look to the Internet to receive election-related news and information, the more important it is to promote—not restrict—the dissemination of such information.

REQUEST TO TESTIFY

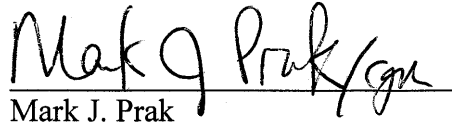
The undersigned respectfully request to testify at the Commission’s public hearing to be held on June 28-29, 2005.

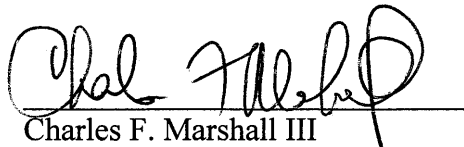
CONCLUSION

For the reasons stated above, the Commission should adopt its proposal to amend its rules to extend the media exemption to include Internet communications.

Respectfully submitted,

**THE NORTH CAROLINA ASSOCIATION
OF BROADCASTERS**


Mark J. Prak


Charles F. Marshall III

BROOKS, PIERCE, McLENDON,
HUMPHREY & LEONARD, L.L.P.
Wachovia Capitol Center, Suite 1600
150 Fayetteville Street Mall (27601)
Post Office Box 1800
Raleigh, North Carolina 27602
Telephone: (919) 839-0300
Facsimile: (919) 839-0304

Its Attorneys

June 3, 2005